No. 02-99

(3)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ALBERTO VALDEZ,

Petitioner,

v.

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* PAUL RICHARD COLELLA IN SUPPORT OF PETITIONER

MICHAEL V. POWELL
Counsel of Record
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8520
Fax: (214) 740-8800

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

6pp

INTEREST OF *AMICUS CURIAE*[1]

Paul Richard Colella is on Texas's death row. The parties have authorized him to file this brief, which raises two new matters. First, 28 U.S.C. § 2254's deferential scheme should not apply when the Texas habeas process, as applied, does not meet due process standards. Second, the failure of the Texas habeas process is not unique to Valdez. The Texas courts gave no consideration to Colella's habeas petition, now pending in federal district court. Instead of answering the state habeas application, as required, the State submitted proposed findings of fact and conclusions of law, which depended mainly on unpleaded defenses. Three (3) days later, a specially-appointed Texas trial judge, who did not preside over Colella's trial, rubber-stamped the findings without a hearing and without even notifying Colella of his intent to do so. At every stage, Colella objected. The Texas courts ignored Colella's objections. With knowledge of Colella's objections to the violations of Texas habeas procedure, the Texas Court of Criminal Appeals issued a *per curiam* order denying Colella relief while acknowledging Colella had not had a hearing in the Texas courts.[2] Texas now cites the

---

[1] In compliance with Supreme Court Rule 37.6, counsel for *amicus curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations made a monetary contribution to the preparation and submission of this brief, which counsel has prepared on a *pro bono* basis.

[2] In 1998, the Texas Court of Criminal Appeals dismissed Colella's first habeas application because court-appointed counsel missed the filing date. New counsel was then appointed. After the passage of a new law, Texas recognized that Colella was allowed to file a new habeas application, which is the application referenced in this brief.

deferential scheme under 28 U.S.C. § 2254 in seeking dismissal of Colella's federal habeas petition.

SUMMARY OF ARGUMENT

Texas recognizes the writ of habeas corpus as a writ of right, and under the Texas Constitution, the Texas legislature has established a procedure in Texas Code of Criminal Procedure article 11.071 for the Texas courts to review habeas applications filed by inmates in State custody. Texas courts have flaunted the procedure or have applied it without affording minimal procedural protection, all to the detriment of the interest to be protected. A federal court should not be required to defer to the Texas habeas court's findings of fact and legal conclusions under 28 U.S.C. § 2254 given the right at issue and the lack of procedural fairness in the resolution of the right.

ARGUMENT

1. 28 U.S.C. § 2254 Does Not Eliminate Procedural Regularity and Fairness in the State Habeas Process.

The decision below requires a federal court to impose 28 U.S.C. § 2254's deferential scheme to the "findings of fact and legal conclusions" even though they were drafted by the State's attorney and signed by the State trial judge who did not preside over Valdez's capital murder trial, without any meaningful review of the trial and habeas record. Valdez's petition documents the flawed process. The Texas trial court elected not to read the trial transcript and ignored relevant evidence. In the judge's own

chilling words: "'I have never read the record of the trial and I don't intend to. I don't have the time.'" *Valdez v. Johnson*, 93 F. Supp.2d 769, 776 (S.D. Tex. 1999), *rev'd*, 274 F.3d 941 (5th Cir. 2001).

The decision below holds that this conduct is irrelevant. *Valdez v. Cockrell*, 274 F.3d 941, 946 (5th Cir. 2001) (refusing to address whether the state habeas court denied Valdez a full and fair hearing because a hearing "is not a prerequisite to the operation of AEDPA's deferential scheme"). According to the panel, the critical issues are whether the Texas court had "an adjudication on the merits" (*id.* at 946, 950) or made "a determination of a factual issue" (*id.* at 949-51).

According to Judge Dennis, the Texas court's process defied "'general notions of procedural regularity and substantive accuracy,'" which are part and parcel of the body of habeas corpus law. *Id.* at 973 (Dennis, J., dissenting). Judge Dennis is correct.

In a federal habeas case involving the death penalty, a plurality of this Court wrote that "this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Spaziano v. Florida*, 468 U.S. 447, 456 (1984)). The rationale rests in the Court's death penalty jurisprudence: "[t]his especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.)). This Court has held that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998).

Ford involved federal court habeas review of Florida's adjudication of insanity alleged in the inmate's habeas petition. The insanity allegation prompted an inquiry by Florida's governor, with the assistance of psychiatrists, to determine whether the condemned had a certain mental capacity. 477 U.S. at 412. The Governor's office refused to consider materials from the inmate's counsel. *Id.* A plurality in *Ford* wrote that "[a]lthough the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether." *Id.* at 411. Florida's procedure was "inadequate to preclude federal redetermination of the constitutional issue." *Id.* at 416.

The Great Writ is "anchored in the ancient common law and in our Constitution." *Townsend v. Sain*, 372 U.S. 293, 311 (1963). The "opportunity for redress" through habeas corpus "presupposes the opportunity to be heard, to argue and present evidence" and this opportunity "must never be totally foreclosed." *Id.* at 312. The process involves adjudication of facts necessary for resolution of the writ in a death case. It should have a high regard for the truth. *Ford*, 477 U.S. at 411.

Colella respects the limited application of the heightened standard of reliability in the habeas context. *See, e.g.*, *Murray v. Giarrantano*, 492 U.S. 1 (1989). In his concurring opinion in *Ford*, Justice Powell invoked "fundamental fairness" as "the hallmark of the procedural protections afforded by the Due Process Clause." 477 U.S. at 424. Florida's insanity procedure was not fair and it invited arbitrariness and error. *Id.* at 424-25. The petitioner's claim "was not adjudicated fairly within the meaning of due process *or* of § 2254(d)." *Id.* at 427 (emphasis added).

In other words, due process could be considered separate from the then-effective section 2254(d). No reason justifies ignoring due process considerations as to the current section 2254.

CONCLUSION

The Great Writ offers the lower federal courts their chance to assure that a person's Constitutional rights are protected before a State executes him. If the federal court must defer to the state findings even though the state court conducted a flawed review or no review, then "federal *habeas* review has been reduced to nothing more than a search for the state judge's signature – a classic example of exalting form over substance." *Valdez v. Cockrell*, 288 F.3d 702, 706 (5th Cir. 2002) (Wiener, Parker, JJ., dissenting). Valdez's petition for writ of certiorari should be granted to assure that the federal habeas process is more than a ministerial act. The state habeas court, knowing a life was at stake, unabashedly elected to ignore the trial transcript and evidence. The federal court should not be required to attach significance to the Texas court's signature when the process giving rise to the signature is unfair and unreliable.

Respectfully submitted,

MICHAEL V. POWELL
Counsel of Record
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8520
Fax: (214) 740-8800

Counsel for Amicus Curiae